Supreme Court, U.S.
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No. 97-1058

In The

Supreme Court of the United States

October Term, 1997

TERRY STEWART, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS;
GRANT WOODS, ATTORNEY GENERAL
OF THE STATE OF ARIZONA,

Petitioners,

vs.

KENNETH JOHN FALCONE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

KENNETH JOHN FALCONE
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Appearing in propria persona

QUESTIONS PRESENTED

Respondent disagrees with the two Questions Presented for Review in the Petitioners' Petition.

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CONSTITUTIONAL PROVISIONS

U.S. Const. Fifth Amendment 1

U.S. Const. Sec. 1, Fourteenth Amendment 1

STATEMENT OF THE CASE

This Petition is seeking this Court's review of the Ninth Circuit's Opinion in *Falcone v. Stewart*, No. 96-15755. App. A To avoid redundancy the Respondent accepts the factual statements contained in that Opinion verbatim, and as detailed below, addresses the misrepresentations of facts contained in this Petition.

The two questions presented to the Court in this Petition are incongruous. The first question presented is simple enough: Does the Double Jeopardy Clause apply to non-capital sentencing? The second question asked is clearly a misrepresentation of the facts of this case, as there was no sentencing package nor any legal consolidation of the two separate causes. Nor does the second question asked by the Petitioners involve any federal constitutional issues, merely a violation of state procedural due process.

The Ninth Circuit clearly indicated that it did not address the due process issue presented as "the disposition of the double jeopardy claim makes it unnecessary for us to consider Falcone's due process claim." App. A, footnote 6 Because the due process claim relating to the denial of procedural due process in the state courts was left undecided by the Ninth Circuit, the Court's review of question two is unwarranted and challenged by the Respondent.

A. The Petition grossly misrepresents the facts of this case when it states that the Respondent's lawyer requested consolidation and that the trial judge issued an order consolidating the cases. Pet. 4

This portrayal is flatly contrary to the facts and the Ninth Circuit's determinations in this matter. App. A-10, A-11

The Respondent and his attorney both understood that the two causes were not consolidated but that they were being heard at the same time for reasons of judicial economy. At no time was the Respondent presented with a determination that the causes had been consolidated, nor would he agree to it or waived double jeopardy which is required under Arizona law, a fact which is overlooked by the Petitioners. App. A-10, footnote 4

The trial judge never made a formal order of consolidation and testified that the two sentences were not interlocking as per terms of the plea agreement. App. A-11

B. The Petition misrepresents the facts and circumstances of this case regarding when the double jeopardy claim was first argued in the Arizona courts.

At the time the motion for reconsideration and petition for review of the first Arizona Court of Appeals decision (Nov. 18, 1991) was filed in the state courts no double jeopardy had attached as the Respondent had not been resentenced on CR-89-02205. Only after resentencing on June 22, 1992 did the attachment of double jeopardy occur.

The original opening brief on appeal after resentencing was filed by appointed counsel who failed to include the double jeopardy argument even though it was his intention to do so. Admitting his error, appellate counsel submitted an amended opening brief and a motion to the court of appeals prior to receiving an answering brief from the state. The court of appeals denied the motion to accept the amended brief which clearly argued double jeopardy. The double jeopardy claim had been fairly presented to the Arizona Court of Appeals which decided to ignore it by the denial of the amended brief. The double jeopardy claim, and an objection to its denial in the appellate court was presented in a petition for review to the Arizona Supreme Court which was also denied.

C. The Petition misrepresents the facts of this case as to the "consolidation or package deal" of the two separate causes.

Again the Petitioners state that the "parties intended a joint disposition of both cases." Pet. 6

While the county attorney testified at the evidentiary hearing that he intended to consolidate the causes, he never made a formal motion to do so. Under Arizona law it is mandatory that a formal motion be made and an opportunity for the defendant to object and request severance. *Quinton v. Superior Court*, 168 Ariz. 545, 815 P.2d 914 (App. 1991) Also, App. A-10, footnote 4

The testimony of the county attorney was convincingly clear and to the point. "But I think it was less than a clear intent that it was a consolidated case." Pet. 6

D. The Petition misrepresents the facts of this case as to the Respondent's legitimate expectation of finality on CR-89-02205, when the two causes were never legally consolidated.

The Petitioners ask this Court to decide the narrower issue of whether the Respondent "had a legitimate expectation of finality in an unchallenged sentence following a successful appeal of its counterpart." Pet. 8 The word counterpart is most troubling and is factually not supported by the record in this matter.

The Petition twists and turns at every opportunity to inject the premise that the two causes were in fact legally consolidated, when there is no basis in fact to support this contention.

REASONS FOR DENYING THE WRIT

The Court has already answered the question of whether the Double Jeopardy Clause applies to non-capital sentencing in *Witte v. U.S.*, 115 S. Ct. 2199 (1995). In *Witte* the Court found that "Significantly, the language of the Double Jeopardy Clause protects against more than the actual imposition of two punishments for the same offense; by its terms it protects a criminal defendant from being twice put in jeopardy for such punishment." *Witte* at 2204 Because *Witte* was a non-capital case it would appear that the reasoning as applied therein as to the Double Jeopardy Clause's application is also applicable to the Respondent's case.

As to the second question presented the facts preclude this Court's attention to a clearly state procedural due process issue that was not decided by the Ninth Circuit, and is not a significant federal issue worthy of review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

KENNETH JOHN FALCONE,
Respondent Pro Se